FILE COPY

Office - Supreme Court, U. S.
FILED
MAY 28 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. ~~829~~ 91.

ALFONSO BATTAGLINO,
Petitioner,

v.

GEORGE C. MARSHALL, Secretary of State of the United States.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

WILLIAM CANTON and JOSEPH F. RUGGIERI,
Attorneys for Petitioner, Alfonso Battaglino.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Questions	2
Statute Involved	2
Statement	4
The Present Litigation	5
Specification of Errors to Be Urged	6
Reasons for Granting the Writ	8

Table of Cases.

	PAGE
Akers v. *Scofield*, C. C. A. 167 F. (2d) 718	10
Baker v. *United States*, 320 U. S. 799	10
Baumgartner v. *United States*, 322 U. S. 665, 679	15
Corpus Juris Secundum, Vol. 17, Sec. 166	10
Cummings v. *Missouri*, 4 Wall. 277, 321	17
Ex parte Garland, 4 Wall. 333, 378	17
Ex parte Gilroy, 257 Fed. 110	8, 11
Haaland v. *Atty. Gen.*, 42 F. Supp. 13	11, 16
In re Bolter, 66 F. Supp. 566	11, 12, 15
In re Bowen (3 Cir.), 130 F. (2d) 22, 23	10
In re Findan, 4 F. Supp. 189	11
Johannessen v. *United States*, 225 U. S. 227	9, 10, 17
Klapprott v. *United States*, 69 Sup. Ct. 384	16
Knauer v. *United States*, 328 U. S. 654, 673, 674	12
Lau Ow Bew v. *United States*, 144 U. S. 47, 59	10
Luria v. *United States*, 231 U. S. 9	9, 10, 17
Perkins v. *Elg*, 307 U. S. 325	8, 11, 15, 17
Perrone v. *U. S.* (3 Cir.) 26 F. (2d) 213	10
Rosenberg v. *United States* (3 Cir.), 60 F. (2d) 475	9, 10
Schaufus v. *Atty. Gen.*, 45 F. Supp. 61, D. C. of Md. (1942)	11
Schneiderman v. *United States*, 320 U. S. 118, 122, 123	8, 11
Thompson v. *Utah*, 170 U. S. 351	17
United States v. *Eliasen*, 11 F. (2d) 785	8
United States v. *Sillman* (3 Cir.), 167 F. (2d) 607, 612	10
United States v. *Knight* (9 Cir.) 299 Fed. 571	10

STATUTES AND MISCELLANEOUS.

PAGE

Naturalization Act of June 29, 1906, Section 15 (34 Stat. 601; 8 U. S. C. 405, repealed by Nationality Act of 1940 and re-enacted substantially as Section 338 (c) of the latter Act, 54 Stat. 1158; 8 U. S. C. 738 (c) 2, 3, 8

United States Revised Statutes, Section 1993 (2 Stat. 155; 8 U. S. C. 6, repealed by Section 504 of the Nationality Act of 1940, which preserved nationality theretofore lawfully acquired, 8 U. S. C. 904) 10

Nationality Act of 1940, Sec. 338 (d) 8 U. S. C. A. Sec. 738 (d) 7, 15, 17

Hearings Before the Committee on Immigration and Naturalization, House of Representatives, 76th Congress, 1st Session, on H. R. 6127, superseded by H. R. 9980—A Bill to Revise and Codify the Nationality Laws of the United States into a Comprehensive Nationality Code, pp. 312, 313..... 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. .....

ALFONSO BATTAGLINO,

Petitioner,

v.

GEORGE C. MARSHALL, Secretary of State of the United States.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

The petitioner Alfonso Battaglino respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Second Circuit entered in the above cause on March 3, 1949, reversing the judgment of the District Court for the Eastern District of New York declaring the petitioner an American citizen.

Opinions Below.

The opinion of the Court of Appeals for the Second Circuit is not yet reported but is printed in the Record at pages 48-53.

The opinion of the District Court is unreported but is printed at R. 35-40.

Jurisdiction.

The judgment of the Court of Appeals was entered on March 3, 1949.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended, 28 U. S. C. 347(a).

Questions.

1. Was petitioner deprived of his derivative citizenship as of the date of his birth by the cancellation for presumptive fraud of the certificate of citizenship of his father, under the provisions of Sec. 15 of the Naturalization Act of June 29, 1906 (34 Stat., 596, 601); and before the Nationality Act of 1940, 54 Stat. 1158; 8 U. S. C. 738 (c), became effective.

2. Did the cancellation of the citizenship of the father of petitioner make the naturalization void and the certificate a nullity ab initio.

3. Was not the citizenship of the father of petitioner valid at the time issued and up to the date when his citizenship was cancelled.

4. Did the subsequent acts or omissions of the father of petitioner affect the citizenship of petitioner which had a valid inception and was vested and choate as of the time of the cancellation of his father's citizenship.

5. Is the presumptive fraud created under the Act the same in its effect and scope as that of actual fraud perpetrated in obtaining citizenship.

6. Was there a patent ambiguity in the Act of 1906 with respect to its omission concerning the effect of a cancellation on derivative rights of citizenship already vested at the time of such cancellation.

7. Did the Court of Appeals err in assuming that the fraud consisted in the false representation that the father intended to become a permanent citizen when the record is devoid and there is no proof that such a representation was made, either in the father's application for citizenship or by subsequent act in leaving this country in 1897 within five years of obtaining his citizenship, when it appears from the record R. 33 that the father returned to this country in 1900 and resided here for six more years so that the evidence of a lack of intention to become a permanent citizen was necessarily rebutted by his return in 1900 and residence in this country until 1906.

Statute Involved.

The pertinent provisions upon which the cancellation was predicated are found in the second paragraph of Section 15 of the Naturalization Act of June 29, 1906,* (34 Stat. 596, 601; 8 U. S. C. 405) which provided as follows:

> "* * * If any alien who shall have secured a certificate of citizenship under the provisions of this chapter shall, within five years after the issuance of such certificate, return to the country of his nativity, or go to any other foreign country and take permanent residence therein, it shall be considered prima facie evidence of a lack of intention on the part of such alien to become a permanent citizen of the

* Repealed by the Nationality Act of 1940 and reenacted substantially as Section 338 (c) of the latter Act, 54 Stat. 1158; 8 U. S. C. 738 (c).

United States at the time of filing his application for citizenship, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the cancellation of his certificate of citizenship as fraudulent, and the diplomatic and consular officers of the United States in foreign countries shall from time to time, through the Department of State, furnish the Department of Justice with the names of those within their respective jurisdictions who have such certificates of citizenship and who have taken permanent residence in the country of their nativity, or in any other foreign country, and such statements, duly certified, shall be admissible in evidence in all courts in proceedings to cancel certificates of citizenship."

Statement.

The petitioner, Alfonso Battaglino, brought suit for a declaratory judgment (a) declaring him to be a citizen of the United States and (b) ordering defendant not to deny a passport to petitioner as a citizen of the United States on the sole ground that he is not a citizen of this country.

After joinder of issue, petitioner moved for summary judgment, and defendant filed a similar motion. The court thereafter granted petitioner's motion for summary judgment for the relief demanded in the complaint without an injunction and an order was entered thereon declaring the petitioner to be a citizen of the United States as of November 26, 1898, the date of his birth, and denying the defendant's motion to dismiss the complaint.

Upon appeal, by the defendant to the United States Court of Appeals for the Second Circuit, the judgment of the District Court was reversed with directions to dismiss the complaint and grant the defendant's motion for summary judgment.

The facts out of which this suit for declaratory judgment was instituted may be summarized as follows:

Alfonso Battaglino, the petitioner herein, was born in Italy on November 26, 1898, and arrived in the United States on August 17, 1924, on a United States passport, duly issued to him as a citizen of the United States by the American Consul in Naples, Italy, on August 13, 1923. Antonio Battaglino, the father of petitioner had been naturalized October 31, 1893, in the Court of Common Pleas of Essex County, N. J. In 1897 he went back to Italy remaining there until 1900, during which time he married and his son, Alfonso, the petitioner herein, was born. In 1900, the father returned to this country remaining here for some six years. He went back to Italy again in December, 1906, remaining there until his death.

In May 1925, his naturalization was cancelled pursuant to the provisions of Sec. 15 of the Act of June 1906, on the ground that he had established a permanent residence in Italy within five years after his naturalization.

In 1946 petitioner applied for a U. S. passport, which was refused him on the grounds that he was not an American citizen as the result of the cancellation of the citizenship of his father and, therefore, not entitled to an American passport, although petitioner had steadfastly since his arrival in this country held himself out as a citizen and exercised without question the privileges of citizenship and assumed its duties and obligations in all respects. R. 25, 26, 27, 28, 29, 30.

The Present Litigation.

The Court of Appeals in reversing, held, first, that as a matter of law, petitioner was deprived of his derivative citizenship by the cancellation for presumptive fraud of

the certificate of citizenship of his father, under the provisions of Sec. 15 of the Act of 1906, *supra;* second, that the cancellation of the citizenship of the father of petitioner made the naturalization void and a nullity ab initio; third that there is no distinction between actual fraud in obtaining citizenship, and the presumptive fraud created by the Act, and that the effect and scope of presumptive fraud is similar to that of actual fraud.

It is our contention that the Court of Appeals has demonstrably erred on each of these grounds; that its decision is based upon the erroneous fundamental premise that there is no distinction between actual fraud in gaining citizenship and the presumptive fraud created by the terms of the Naturalization Statute of 1906; that the subsequent annulment of citizenship valid in its inception destroys rights created thereunder; that a change in the status of petitioner's parent invalidates citizenship acquired at birth by petitioner.

We contend that the decision of the Court of Appeals, because of these errors, probably conflicts with applicable decisions of this Court; that this Court has never ruled on the effect on derivative rights of citizenship of a cancellation of citizenship under the Act of June 29, 1906; that this is an important question of federal law involving the interpretation and construction of this federal statute and one which should be settled by this Court.

Specification of Errors to be Urged.

The Court below erred

(1) in holding that the petitioner lost his derivative citizenship as a result of the cancellation in 1925 of the citizenship of his father for presumptive fraud;

(2) in ruling that the cancellation of the citizenship of the father of petitioner annulled the certificate of citizenship and made such citizenship void ab initio;

(3) in deciding that there is no distinction between actual fraud in procuring citizenship and the presumptive fraud recognized by the Naturalization Act of 1906;

(4) in holding that although the citizenship of petitioner was valid in its inception, vested and choate as of the time of the cancellation of the citizenship of the petitioner's father, nonetheless petitioner's citizenship must be held to have been annulled as of the date of his birth;

(5) in deciding that the citizenship of the father was invalid as of its origin as a result of the annulment of the citizenship rather than as of the date when his citizenship was cancelled;

(6) in holding in support of its decision that the law controlling the appeal was changed by the terms of Sec. 338 (d) of the Nationality Act of 1940,* 8 U. S. C. A. Sec. 738 (d) which states, *inter alia,* that cancellation for presumptive fraud shall not result in the loss of derivative citizenship of a wife or minor child of the naturalized person, but the citizenship of said wife or minor child shall

---

* (d) The revocation and setting aside of the order admitting any person to citizenship and canceling his certificate of naturalization under the provisions of subsection (a) of section 338 shall not, where such action takes place after the effective date of this Act, result in the loss of citizenship or any right or privilege of citizenship which would have been derived by or available to a wife or minor child of the naturalized person had such naturalization not been revoked, but the citizenship and any such right or privilege of such wife or minor child shall be deemed valid to the extent that it shall not be affected by such revocation: *Provided,* That this subsection shall not apply in any case where the revocation and setting aside of the order was the result of actual fraud.

be deemed valid to the extent that it shall not be affected by such revocation: Provided that this subsection shall not apply in any case where the revocation was the result of *actual fraud* (italics ours), and thereby changed the existing law; *whereas it is apparently the reverse of this contention in that this Section merely enacted into statutory law the decisions construing the second paragraph of Section 15 of the Naturalization Act of 1906.*

Reasons for Granting the Writ.

1. The fundamental premise of the Court of Appeals here was that the petitioner lost his citizenship as a result of the subsequent annulment in 1925 of his father's certificate of citizenship. This conclusion conflicts with the principles of *Perkins* v. *Elg,* 307 U. S. 325, in which this Court ruled that a child could not be deprived of his citizenship solely because of a subsequent change in the status of his parent. See also *Ex parte Gilroy,* 257 Fed. 110.

The Court of Appeals failed to recognize that the grant of citizenship to the father of petitioner having been valid in its inception, its subsequent annulment did not invalidate its origin nor should it impair rights which accrued thereunder. *United States* v. *Eliasen,* 11 F. (2d) 785. It is conceded that the father's citizenship was valid in its inception and continued valid until annulled by the government.

The petitioner having assumed all of the obligations, privileges and prerogatives of American citizenship (R. 25, 26, 27, 28, 29, 30) and having had all of the rights of citizenship conferred on him, such citizenship should not be taken away without the clearest sort of justification and proof. As this Court so aptly stated in *Schneiderman* v. *United States,* 320 U. S. 118, 122, 123, "Especially is this

so when the attack is made long after the time when the certificate of citizenship was granted and the citizen meanwhile has met his obligations and has committed no act of lawlessness".

Had the citizenship of the petitioner's father been obtained by *actual fraud*, there is no question that the government would have the power to annul "merely colorable letters of citizenship to which their possessors never were lawfully entitled". *Johannessen* v. *United States*, 225 U. S. 227; *Rosenberg* v. *United States* (3 Cir.), 60 F. (2d) 475. However, there was a valid inception to the citizenship of the father of petitioner and consequently these cases are inapplicable. While this Court in *Luria* v. *United States*, 231 U. S. 9, did decide that the provisions of the second paragraph of Sec. 15 of the Naturalization Act of June 29, 1906 are constitutional in that under this Act the government has the power to cancel citizenship for presumptive fraud, nevertheless, this Court has never decided the effect of such cancellation on derivative rights of citizenship that were vested for a considerable time before the cancellation took effect.

Furthermore, the facts in the *Luria* case point to the definite conclusion that the plaintiff in that case had in all probability never sincerely adopted the oath of allegiance when he assumed his citizenship. For it appears that approximately four months later Luria left the United States for South Africa where he resided and practiced medicine for some sixteen years; that his only return to the United States, after thirteen years of residence and practice in South Africa, was for four or five months for the temporary purpose of taking a postgraduate course in a medical school.

The Court should note that in the instant case, *there was actually countervailing evidence to rebut the presumption of a lack of intention on the part of the father to become a*

permanent citizen since it appears that the father of the petitioner returned to this country in 1900 and resided here until 1906. Consequently, it is evident that there was no intention on the part of petitioner's father to take permanent residence in his native country within five years after the issuance of his certificate of naturalization. See *U. S.* v. *Knight* (9 Cir.) 299 F. 571; *Perrone* v. *U. S.* (3 Cir.) 26 F. (2d) 213. Further, so far as is known, the father never received any actual notice of the proceedings to cancel his citizenship, which was voided by a decree based on publication of process.

2. The erroneous premise of the Court of Appeals that the presumptive fraud requires a cancellation ab initio of the citizenship of petitioner is an unwarranted extension of any principles laid down by the *Johannessen* and *Luria* cases *supra.*

Generally, fraud renders transactions voidable, In *re Bowen* (3 Cir.) 130 F. (2d) 22, 23, cert. denied, *Baker* v. *United States,* 320 U. S. 799; *United States* v. *Sillman* (3 Cir.) 167 F. (2d) 607, 612; *Akers* v. *Scofield,* C. C. A. 167 F. (2d) 718, and until avoided the transaction continues valid, 17 C. J. S. Sec. 166. Had the father's certificate been cancelled by reason of any actual fraud, such a naturalization would have been a nullity and obviously vitiated any rights founded upon such naturalization. *Johannessen* and *Rosenberg* cases *supra.* There are no cases which go so far as to *cancel ab initio* any citizenship of children who became citizens at their birth by virtue of the provisions of Sec. 1993 of the Revised Statutes.* In fact all of the cases in

---

* Section 1993 of the Revised Statutes of the United States (Comp. Stat. Sec. 3947) provided as follows: All children heretofore born or hereafter born out of the limits and jurisdiction of the United States whose fathers were or may be at the time of their birth citizens thereof are declared to be citizens of the United States, * * *. 2 Stat. 155; 8 U. S. C. 6, repealed by Section 504 of the Nationality Act of 1940, which preserved nationality theretofore lawfully acquired, 8 U. S. C. 904.

which this issue was involved are all contra.* *Ex parte Gilroy, supra,* In *re Findan,* 4 F. Supp. 189; *Haaland* v. *Attorney General,* 42 F. Supp. 13; In *re Bolter,* 66 F. Supp. 566. In both the *Findan* and *Bolter* cases, the Courts in deciding factual situations exactly like that in which the petitioner finds himself, held that the presumptive fraud of the 1906 Act did not destroy *ab initio* citizenship rights already vested and choate. The Court in deciding this issue cited in support of its ruling *Schneiderman* v. *United States,* 320 U. S. 118, 122, 123, and *Lau Ow Bew* v. *United States,* 144 U. S. 47, 59, 12, S. Ct. 517, 520, 36 L. Ed. 340.

Had the father of petitioner *illegally or fraudulently procured* his certificate of citizenship, then under the elementary principles of the law of fraud, he would have never validly become a citizen, and consequently any derivative rights of citizenship would necessarily be null and void. A cancellation on such grounds would, of course, be a cancellation *ab initio.* However, the distinction to be drawn is that there having been a valid inception to the father's citizenship in 1893, its subsequent annulment thirty-two years later for presumptive fraud, which came into being by virtue of the Act of 1906, could not invalidate the origin, or impair the rights of citizenship of the petitioner which had already accrued in 1898 and become vested and choate in 1923 when he took the oath of allegiance as an American citizen.

---

* The status of a foreign born person as an American citizen because of previous naturalization of his father was to be determined in accordance with requirements of such laws as were in effect at the time of the person's birth, and subsequent related events, where the person was born before adoption of the Nationality Act of 1940, Nationality Act of 1940, Sec. 201 (c), 313, 347, 407, 8 U. S. C. A. Sec. 601 (c), 713, 747, 807. See *Perkins* v. *Elg,* 307 U. S. 325, 59 S. Ct. 884; *Schaufus* v. *Attorney General,* 45 F. Supp. 61, D. C. Md. (1942), *Ex parte Gilroy* and *In re Findan, supra.*

Nor is this a situation where "Congress may provide for the cancellation of certificates of naturalization on the ground of fraud in their procurement and thus protect the courts and the nation against practices of aliens who by deceitful methods obtain the cherished status of citizenship here the better to serve foreign masters". *Knauer* v. *United States,* 328 U. S. 654, 673, 674. There was no fraud in procuring citizenship in the case at bar.

The Court *In re Bolter, supra,* in discussing this matter stated (p. 567):

> "Hannah Bolter has filed her petition to be naturalized as a citizen of the United States pursuant to Sec. 310(a) of the Nationality Act of 1940. The petition is predicated upon petitioner's claim that she is an alien who, after Sept. 21, 1922, and prior to May 24, 1934, has married a citizen of the United States * * *." Title 8, U. S. C. A. Sec. 710(a).

The Court recited here Section 1993 governing at the date of birth of petitioner's husband, Jack Bolter:

> "The plain wording of the statute just quoted makes it manifest that, since his father was admittedly a citizen in December of 1903, Jack Bolter was born a citizen of the United States. See: Citizenship of the U. S. Expatriation and Protection Abroad, Document No. 326, page 78, 39th Congress, 2nd Session.
>
> Moreover, that status acquired by birth was recognized 20 years later when he was issued a passport and permitted to enter the United States for permanent residence as an American citizen, and to vote and otherwise exercise the rights of citizenship.
>
> It is conceded that Bolter himself has not done or omitted to do any act which could lawfully deprive him of the American citizenship which descended to him by operation of law at birth."

The Commissioner of Immigration urged in this case that cancellation in 1929 of the citizenship of Bolter's father operated *ipso facto* to deprive Bolter of his long enjoyed status of an American citizen.

Continuing the Court stated (p. 568):

> "Thus in the language of *Schneiderman* v. *United States* (1942), 320 U. S. 118, 122, 123, 63 S. Ct. 1333, 1335, 87 L. Ed. 1796, the government seeks to deprive him of the priceless benefits that derived from that status. In its consequences it is more serious than a taking of one's property, or the imposition of a fine or other penalty. For it is safe to assert that nowhere in the world today is the right of citizenship of greater worth to an individual than it is in this country. It would be difficult to exaggerate its value and importance. By many it is regarded as the highest hope of civilized men • • • such a right once conferred should not be taken away without the clearest sort of justification and proof. • • • the facts and the law should be construed as far as is reasonably possible in favor of the citizen.
>
> (4) As was observed in *Lau Ow Bew* v. *United States*, 1892, 144 U. S. 47, 59, 12 S. Ct. 517, 520, 36 L. Ed. 340: 'Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislation intended and, if possible, so as to avoid an unjust or absurd conclusion.' This admonition would seem to have especial application where, as here, choice of one possible construction would operate to change a citizenship status of long standing without any act or omission on the part of the person whose status would thus be changed. *Haff* v. *Yung Poy*, 9th Cir., 1933, 68 F. (2d) 203, 205.

(P. 569):

> But there can be no doubt that Jack Bolter was 'born an American citizen'. *Ex parte Gilroy*, D. C.

N. Y. 1919, 257 Fed. 110, 116. It is equally beyond dispute that he retained that status and was recognized as an American citizen during the following 25 years and more—until his father's citizenship was cancelled in 1929.

It is also conceded that the father's certificate was not cancelled by reason of any actual fraud, which would have rendered his naturalization a nullity. *Cf. Rosenberg* v. *U. S.*, 3 Cir., 60 F. (2d) 475.

(5) Precedent holds that when born an American citizen, a child does not *ipso facto* lose that status merely by reason of change in the status of the parents. *Perkins* v. *Elg*, 1938, 307 U. S. 325, 329, 344, 59 S. Ct. 884, 83 L. Ed. 1320; *Haaland* v. *Attorney General*, D. C. Md., 1941, 42 F. Supp. 13, 21; *In re Findan*, D. C. R. I., 1933, 4 F. Supp. 189, 190.

To paraphrase the language of *Perkins* v. *Elg*, *supra*, 307 U. S. 325 at page 329, 59 S. Ct. 884, 83 L. Ed. 1320: As at birth Jack Bolter became a citizen of the United States, that citizenship must be deemed to continue unless he has been deprived of it through the operation of a treaty or Congressional enactment or possible voluntary action in conformity with applicable legal principles. *Cf. Schaufus* v. *Attorney General*, D. C. Md., 1942, 45 F. Supp. 61. *Obvious considerations would seem to call for an unequivocal expression if Congress desires to legislate a different result.*" (Italics added.)

It would seem that the reasoning and logic of the foregoing is most apposite. To hold otherwise would result in a harsh, illogical, unjust, and inequitable ruling.

3. In support of its reasoning, the Court of Appeals states that Congress did in the Naturalization Act of 1940 soften the effect prospectively of cancellation of certificates of citizenship upon those claiming derivatively under them.

It concedes that since that Act, by virtue of Sec. 338 (d), 8 U. S. C. A. Sec. 738 (d), cancellation for presumptive fraud does not result in the loss of citizenship of the wife or minor child of the naturalized person. The Court of Appeals held that this provision came too late to be of aid to petitioner. "Its only significance, if it has any at all, would be to emphasize that the law controlling this appeal was thereby changed." R. 53. However, no cases nor any authority whatsoever in support of this proposition have been cited by the Court of Appeals. All of the cases decided involving an interpretation and construction of the effect of cancellation under the 1906 Act are all *contra* and support a reverse proposition. It is more than likely that in the words of Mathes, D. J., *In re Bolter, supra,* p. 567, Congress enacted this provision out of an "abundance of caution" to eliminate any doubts whatsoever on this score, and for the purpose of enacting into the statute the decisions of courts and the thinking of Congress on this subject. See Hearings Before the Committee on Immigration and Naturalization, House of Representatives, 76th Congress, 1st Session, on H. R. 6127, superseded by H. R. 9980—A Bill to Revise and Codify the Nationality Laws of the United States into a Comprehensive Nationality Code, pp. 312, 313.

The anomalous result reached by the Court of Appeals in depriving the petitioner of his citizenship conflicts directly with the holding of this Court in *Baumgartner* v. *United States,* 322 U. S. 665, 679 "American citizenship is not a right granted on a condition subsequent". In effect this is the decision of the Court of Appeals.

A free and secure society abjures all forms of limited citizenship. The ruling of the Court of Appeals makes the son, the petitioner herein, the keeper of his father. Are the sins (*sic,* the acts and omissions) of the father to be visited on the son? *Perkins* v. *Elg, supra.* At what stage

in the life of the son can he claim a secure and untrammelled citizenship, or is his citizenship to be of a second class variety forever dependent upon the conduct of his father no matter how long ago his citizenship rights were vested?

The Court in *Haaland* v. *Attorney General*, 42 F. Supp. 13 answered logically a point that should be followed if decisions affecting the status of citizens born abroad of an American parent are not to become so complicated as to lead to confusing and inequitable results respecting the status of many persons. In commenting on the right to citizenship of persons born outside of the United States, the court stated (p. 19):

> "While it is true that petitioner's right to citizenship is derivative in that it must stand or fall upon his father's status and not upon his own at the time of birth, nevertheless, we feel that in the present circumstances, petitioner should not be and is not required by law to be placed in a less favorable position as respects his assertion of citizenship than are persons born outside the country of *subsequently* naturalized parents. By virtue of R. S. Sec. 2172, 8 U. S. C. A. Sec. 7 and Sec. 5 of the Act of March 2, 1907, 8 U. S. C. A. Sec. 8, under the former, a foreign-born child dwelling in the United States at the time of the naturalization of the parent automatically becomes a citizen * * *". (Italics added.)

As a result of the decision of the Court of Appeals, the petitioner is not only deprived of his citizenship, but will be technically subject to deportation. "To take away a man's citizenship deprives him of a right no less precious than life or liberty, indeed of one which today comprehends those rights and almost all others" *Klapprott* v. *United States*, 69 Sup. Ct. 384, 391 (1949).

4. There is obviously a patent ambiguity in the Naturalization Act of 1906 which did not provide for situations wherein derivative rights of citizenship accrued in contrast to the provisions of Sec. 338 (d) of the Nationality Act of 1940, 8 U. S. C. A. 738 (d) which specifically validates such derivative status. The ambiguity of the Naturalization Act of 1906, which has given rise to the paradoxical situation in which the petitioner finds himself a man without a country, after approximately 25 years of allegiance, earnest devotion and fidelity to the principles and institutions of this country should be settled by this Court.

Needless to say the citizenship rights of petitioner are prized by him and are paramount to any possession that he holds dear. The consequences of the loss of petitioner's citizenship are more serious than a taking of his property or the imposition of a fine or penalty. *In its effect on petitioner* the construction of the Act of 1906 decided by the Court of Appeals is *ex post facto* in nature and spirit if not within the letter of such legislation. See *Luria* v. *United States, supra,* p. 24; *Johannessen* v. *United States, supra,* pp. 241, 242; *Thompson* v. *Utah,* 170 U. S. 351; and *Cummings* v. *Missouri,* 4 Wall. 277, 321; *Ex parte Garland,* 4 Wall. 333, 378.

As was so well expressed by Chief Justice Hughes in *Perkins* v. *Elg, supra,* p. 337, in discussing the effect of the treaty between Sweden and the United States and the ambiguity respecting certain rights belonging to a child with its serious consequences on the citizenship of the child, "if the abrogation of the right had been in contemplation it would naturally have been the subject of a provision suitably explicit. *Rights of citizenship are not to be destroyed by an ambiguity.*" (Italics added.)

It is submitted that if there is an ambiguity in the Act of 1906, vested rights of citizenship should not be destroyed by such an ambiguity.

WHEREFORE, it is respectfully requested that this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM CANTON and JOSEPH F. RUGGIERI,
Attorneys for Petitioner.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	4
Argument	6
Conclusion	19

CITATIONS

Cases:

Becker Co. v. *Cummings*, 296 U. S. 74	15
Bolter, In re, 66 F. Supp. 566	17
Duignan v. *United States*, 274 U. S. 195	15
Findan, In re, 4 F. Supp. 189	17
Haaland v. *Attorney General of the United States*, 42 F. Supp. 13	16
Husty v. *United States*, 282 U. S. 694	15
Johannessen v. *United States*, 225 U. S. 227	7, 16
Klapprott v. *United States*, 335 U. S. 601, 336 U. S. 942, 949	15
Luria v. *United States*, 231 U. S. 9	7, 9, 10, 14, 15, 16, 17
Perkins v. *Elg*, 307 U. S. 325	16, 17
Rosenberg v. *United States*, 60 F. 2d 475, certiorari denied, 287 U. S. 645	7, 13
Sonzinsky v. *United States*, 300 U. S. 506	15
United States v. *Dietz*, 52 F. Supp. 201	16
United States v. *Eliasen*, 11 F. 2d 785	16
United States v. *Holtz*, 54 F. Supp. 63, affirmed *sub nom. Kuehn* v. *United States*, 162 F. 2d 716, certiorari denied, 332 U. S. 837	16
United States v. *Schlotfeldt*, 136 F. 2d 935, certiorari denied *sub nom. Krause* v. *United States*, 327 U. S. 781	7
United States ex rel. Eichenlaub v. *Watkins*, 167 F. 2d 659, certiorari denied, 335 U. S. 867, order denying certiorari vacated and certiorari granted June 27, 1949, No. 3	18
United States ex rel. Willumeit v. *Watkins*, 171 F. 2d 773, certiorari granted June 27, 1949, No. 82	18

Statutes involved:

Nationality Act of 1940, 54 Stat. 1137:

§ 201 (8 U.S.C. 601)	2
§ 307 (8 U.S.C. 707)	18
§ 310 (8 U.S.C. 710)	18
§ 319(a) (8 U.S.C. 719(a))	12, 14

Statutes—Continued

	Page
§ 338 (8 U.S.C. 738)	2
§ 338(d) (8 U.S.C. 738(d))	10, 11, 12, 17
§ 503 (8 U.S.C. 903)	6
§ 504 (8 U.S.C. 904)	2
Naturalization Act of June 29, 1906, Sec. 15, 34 Stat. 601, as amended, 40 Stat. 544 (8 U.S.C. [1934 ed.] 405)	2, 5, 6, 7, 8, 9, 16
Revised Statutes, Sec. 1993	2
Miscellaneous:	
40 Cong. Rec. 7040	8, 9
40 Cong. Rec. 7041	9
Hearings before the House Committee on Immigration and Naturalization on H. R. 6127, superseded by H. R. 9980, 76th Cong., 1st sess.	10, 11, 13, 14
36 Ops. A. G. 446	13

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 91

ALFONSO BATTAGLINO, PETITIONER

v.

GEORGE C. MARSHALL, SECRETARY OF STATE OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 48-51) is reported at 172 F. 2d 979. The opinion of the District Court (R. 35-40) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered March 3, 1949 (R. 52). The petition for a writ of certiorari was filed May 28, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Petitioner was born in Italy of a parent who previously had been naturalized as a citizen of the United States, but who, within five years of his naturalization, returned to Italy. Thereafter, petitioner's father's certificate of citizenship was canceled by a default judgment entered against him pursuant to Section 15 of the Naturalization Act of 1906. The question is whether petitioner is a citizen of the United States.

STATUTES INVOLVED

Section 1993 of the Revised Statutes [1] provided in pertinent part as follows:

> All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; * * *.

Section 15 of the Naturalization Act of June 29, 1906, 34 Stat. 601, as amended, 40 Stat. 544 (8 U. S. C. [1934 ed.] 405),[2] provided in pertinent part as of the date petitioner's father's certificate of citizenship was canceled:

> That it shall be the duty of the United States district attorneys for the respective districts

[1] Repealed and superseded by the Nationality Act of 1940, §§201 and 504 (8 U. S. C. 601, 904).

[2] Repealed and superseded by the Nationality Act of 1940, §§338 and 504 (8 U. S. C. 738, 904).

or the Commissioner or Deputy Commissioner of Naturalization, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured. In any such proceedings the party holding the certificate of citizenship alleged to have been fraudulently or illegally procured shall have sixty days personal notice in which to make answer to the petition of the United States; and if the holder of such certificate be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.

If any alien who shall have secured a certificate of citizenship under the provisions of this Act shall, within five years after the issuance of such certificate, return to the country of his nativity, or go to any other foreign country, and take permanent residence therein, it shall be considered prima facie evidence of a lack of intention on the part of such alien to become a permanent citizen of the United States at the time of filing his application for citizenship, and, in the absence of countervailing evidence, it shall be sufficient in the proper

proceeding to authorize the cancellation of his certificate of citizenship as fraudulent, and the diplomatic and consular officers of the United States in foreign countries shall from time to time, through the Department of State, furnish the Department of Justice with the names of those within their respective jurisdictions who have such certificates of citizenship and who have taken permanent residence in the country of their nativity, or in any other foreign country, and such statements, duly certified, shall be admissible in evidence in all courts in proceedings to cancel certificates of citizenship.

* * *

The provisions of this section shall apply not only to certificates of citizenship issued under the provisions of this Act, but to all certificates of citizenship which may have been issued heretofore by any court exercising jurisdiction in naturalization proceedings under prior laws.

STATEMENT

Petitioner's father, Antonio Battaglino, a native of Italy, now deceased, was naturalized in the Court of Common Pleas of Essex County, New Jersey, on October 31, 1893 (R. 3, 10, 31). Early in 1897, Antonio returned to Italy, where he married the following year (R. 10). An affidavit of a purported friend of Antonio indicates that he may have returned to the United States in 1900 and remained until 1906 (R. 33), but it is not disputed that he

did not return to this country after that time. Petitioner, who was born in Italy late in 1898, came to this country in 1924 on an American passport issued to him in Italy, after he had taken an oath of allegiance to the United States (R. 3-4, 10-11). Petitioner subsequently married an American citizen, who has since died, and a daughter born of the marriage now lives with him in New York (R. 11). Since petitioner's arrival in this country, he has voted and exercised other "prerogatives" and assumed the "obligations" of a citizen of the United States (R. 4, 11). In 1933 he went into the restaurant business with a partner and since that time they have secured liquor licenses from the New York State Liquor Authority. Petitioner alleged that applicants for such licenses must be American citizens. (R. 4, 11-12; see also R. 28-29.)

In November 1946, petitioner applied for a passport as an American citizen to enable him to visit in Italy. In a letter dated December 6, 1946, denying the application, the State Department informed petitioner that in the opinion of the Department he was "not an American citizen," since his father's certificate of naturalization had been cancelled by a final decree in May 1925, pursuant to the provisions of the second paragraph of Section 15 of the Act of June 29, 1906, *supra,* because he had established a permanent residence in Italy within five years after his naturalization. In the same letter, petitioner was advised that if he desired to

become naturalized he should communicate with the nearest naturalization examiner. (R. 12, 31-32.)

Instead, in January 1947, pursuant to Section 503 of the Nationality Act of 1940, 8 U. S. C. 903,[3] petitioner instituted this action in the United States District Court for the Eastern District of New York for a declaratory judgment that he is a citizen (R. 2, 3-5). Both parties moved for summary judgment (R. 8-9, 34) and petitioner's motion was granted (R. 41-42). The Court of Appeals for the Second Circuit reversed with directions to grant respondent's motion for summary judgment (R. 52).

ARGUMENT

The court below held that the cancellation of a certificate of citizenship under Section 15 of the Naturalization Act of 1906, *supra*, pp. 2-4, whether on the ground of actual or presumptive fraud, nullified the certificate *ab initio* and vitiated any derivative rights of citizenship arising out of the certificate (R. 50-51). We think this is a correct interpretation of that statute and that the contentions urged in the petition for a writ of certiorari

---

[3] "If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. * * *"

involve no question of sufficient current importance to warrant further review by this Court.

Petitioner concedes that if his father's certificate had been canceled on the ground of actual fraud, the certificate would have been rendered void *ab initio* and that he would have no justification for claiming citizenship. *Rosenberg* v. *United States,* 60 F. 2d 475, 476 (C. A. 3), certiorari denied, 287 U. S. 645; *United States* v. *Schlotfeldt,* 136 F. 2d 935, 939-940 (C. A. 7), certiorari denied *sub nom. Krause* v. *United States,* 327 U. S. 781. He argues, however, that since his father's certificate was cancelled on the ground of presumptive fraud pursuant to the provisions of the second paragraph of Section 15, the certificate must be considered to have been valid in its inception and that his derivative rights, having become fixed before it was cancelled, were not affected by the judgment. (Pet. 9, 11.)

This Court has not recognized such a distinction as petitioner suggests. Denaturalization under Section 15 of the 1906 Act, whether based on actual or presumptive fraud, resulted in "the annulment, by appropriate judicial proceedings, of merely colorable letters of citizenship, to which their possessors never were lawfully entitled." *Luria* v. *United States,* 231 U. S. 9, 24; see also *Johannessen* v. *United States,* 225 U. S. 227. As the court below pointed out (R. 51), the *Luria* case, which sustained the validity of the second paragraph of Section 15,

demonstrates that "the distinction between what is called presumptive fraud and actual fraud is but a difference in the manner of proof to establish the fact that the applicant for citizenship did not intend 'to become a permanent citizen of the United States at the time of filing his application for citizenship' [Sec. 15]."

Moreover, the legislative history of Section 15 shows that Congress did not intend any such distinction as petitioner urges. The second paragraph of that section was not in the bill as reported, but was added on the floor of the House. Congressman Crumpacker, who proposed the addition, stated that it was "aimed chiefly at the class of aliens who come here for the sole purpose of securing citizenship to be used abroad to protect them against the impositions and exactions of foreign countries where they intend to permanently live." He said that citizenship obtained under such circumstances is based upon a fraudulent representation that the applicant "intended to become a permanent resident of this country, when, in fact, he did not," and that his amendment would provide "a rule of evidence by which courts may, in the absence of contrary proof, infer a fraudulent design on the part of the holder of the certificate in the first instance to secure citizenship for improper purposes." "Fraud," the Congressman continued, "vitiates all proceedings and can be the basis of no

right in law.[4] It [i. e., his amendment] is in line with the theory of section 17 of the bill [sec. 15 as enacted], and I am sure that its adoption would afford much relief to the country in a direction where some specific remedy is badly needed." 40 Cong. Rec. 7040. Congressman Crumpacker's amendment was adopted without change. Compare 40 Cong. Rec. 7041 with the second paragraph of section 15, *supra*, pp. 3-4.

It is thus clear that Congress regarded an applicant's subjective intent not to become a permanent resident of the United States but to take up foreign residence after securing American citizenship as fraud upon the naturalization court to be treated as any other fraud, i. e., as vitiating the grant of citizenship. Congress was dealing with fraud in the procurement of American citizenship and for the first time it provided for the cancellation of certificates procured by fraud. The fact that it added a special "rule of evidence" (*Luria* v. *United States, supra*, at p. 25) to be applied in a proceeding to cancel the certificate of a naturalized person who, within the specified period, returned to his native land or took up other foreign residence, thus indicating that he had no intention to reside permanently in the United States, furnishes no basis for a contention that the effects of cancellation in such

---

[4] Earlier in his discussion of Section 15, Congressman Crumpacker said: "A certificate tainted with fraud is in the sense of the law no certificate at all." 40 Cong. Rec. 7040.

a proceeding are different than the effects flowing from cancellation of a certificate upon direct proof of fraud of any other character. In either case, the result is "the annulment, by appropriate judicial proceedings, of merely colorable letters of citizenship, to which their possessors never were lawfully entitled." *Luria* v. *United States, supra,* at p. 24.

In further support of its conclusion that petitioner did not derive citizenship through his father, the Court of Appeals pointed out that in Section 338(d) of the Nationality Act of 1940 (54 Stat. 1159, 8 U. S. C. 738(d)),[5] Congress changed prospectively the effect of cancellation of a certificate for presumptive fraud upon those claiming derivatively under the certificate (R. 51). Petitioner contends that it is more likely that Section 338(d) was enacted out of an abundance of caution to emphasize what the prior law had been and to enact into statute the judicial decisions and congressional views on the subject (Pet. 15). In this connection petitioner cites, without more, Hearings before the House Committee on Immigration and

---

[5] "The revocation and setting aside of the order admitting any person to citizenship and canceling his certificate of naturalization under the provisions of subsection (a) of section 338 shall not, where such action takes place after the effective date of this Act, result in the loss of citizenship or any right or privilege of citizenship which would have been derived by or available to a wife or minor child of the naturalized person had such naturalization not been revoked, but the citizenship and any such right or privilege of such wife or minor child shall be deemed valid to the extent that it shall not be affected by such revocation: *Provided*, That this subsection shall not apply in any case where the revocation and setting aside of the order was the result of actual fraud."

Naturalization on H. R. 6127, superseded by H. R. 9980 (subsequently enacted as the Nationality Act of 1940), 76th Cong., 1st sess., pp. 312-313.

There is no warrant for this contention. In the first place the language of Section 338(d) presupposes that without its prospective saving provision, the cancellation of the citizenship of a parent would result in the loss of derivative rights, for it provides that where such cancellation occurs "after the effective date of this Act, [it shall not] result in the loss of citizenship or any right or privilege of citizenship *which would have been derived by or available to* a wife or minor child of the naturalized person *had such naturalization not been revoked*" (italics supplied).

The legislative history of Section 338(d) also shows that Congress intended to change what it deemed to be the prior law. Section 338(d) was not included in the original draft of the bill, but was incorporated by the House Committee on Immigration and Naturalization as the result of a suggestion by a private group (Hearings, *supra*, pp. 313, 397). That the Committee considered Section 338(d) would change existing law is clear from the following colloquy in respect of the proposal (*id.*, 313)—

> Mr. Hazard.[6] The Department of Labor agreed to it because of the hardships in the case

---

[6] Director of Research, Information, and Education, Immigration and Naturalization, Labor Department (*id.*, 31).

of children who had to be deported where the parents had been naturalized and later naturalization was canceled, the children having come into the United States in the meantime.

Mr. Rees. Is there anyone here who wants to discuss the reason for that further?

Mr. Mason. I do not see any objection to it. If we revoke a father's citizenship because of certain actions and the child should become a citizen, I do not see why it should apply to the child also.

Mr. Hazard. Some of the courts have taken that view.

Mr. Mason. Yes; I understand that, and this is changing that. I have no objection to this change.

Mr. Lesinski. If there is no objection, the same stands approved.

The significance of Section 338(d) and its legislative history are further emphasized when considered in connection with Section 319(a) of the Nationality Act of 1940 (54 Stat. 1148, 8 U. S. C. 719(a)) and its legislative history. The latter section, in part, established a special procedure for the naturalization of "A person who as a minor child *lost* citizenship of the United States *through the cancelation of the parent's naturalization* on grounds other than actual fraud or presumptive fraud as specified in the second paragraph of section 15 of the Act of June 29, 1906, * * *" (italics supplied). Here again, the language of the new statute presupposed that under the prior law de-

rivative rights were vitiated upon cancellation of a parent's certificate. And again, the legislative history shows that Congress was cognizant of that interpretation of the prior law. The explanatory notes accompanying the draft of the President's committee for the revision and codification of the nationality laws, upon which the Nationality Act of 1940 was based, shows that the attention of Congress was directed to the decision in *Rosenberg* v. *United States,* 60 F. 2d 475 (C. A. 3), *supra,* p. 7, and the opinion of the Attorney General in the case of *Pietro Mariani,* 36 Ops. Att'y Gen. 446. Hearings, *supra,* pp. 448-449.

In the *Rosenberg* case, the court held that a certificate granted to Rosenberg and later cancelled under Section 15 of the Naturalization Act of 1906 on the ground of actual fraud conferred "no rights whatever" (p. 476) on him or his wife. In the *Mariani* case, the Attorney General ruled, on the basis of *Luria* v. *United States, supra,* that the cancellation of Mariani's certificate under Section 15 on the ground of presumptive fraud vitiated the derivative rights of Mariani's wife and child because the certificate was a "nullity" (p. 449).

The testimony of Mr. Shoemaker, Deputy Commissioner of Immigration and Naturalization, before the House Committee indicates that the Immigration and Naturalization Service had long relied on the precedents established in the *Rosenberg* and *Mariani* cases. Mr. Shoemaker stated that "It has

been held generally that where a certificate of naturalization is canceled for fraud or illegal procurement, anyone, whether the person or one claiming under or through him loses all status." Significantly, he used as an illustration of the application of the prior law, the following example: "Take a case where an individual was naturalized in 1910, and 5 years after that naturalization the person went abroad, and the child remained in the United States. The child acquired citizenship through the act of the father. In 1940, say that the certificate is canceled, that would divest that child of his American citizenship status, despite the fact that he has been in the United States all of that time, and this [i. e., Sec. 319(a)] would cure that." Hearings, *supra*, p. 100.[7]

In an attempt to distinguish this case from *Luria* v. *United States*, 231 U. S. 9, petitioner contends that there was actually countervailing evidence to rebut the presumption of a lack of intention on the part of his father to become a permanent resident of the United States, since it appears that his father resided in this country between 1900 and 1906 (see p. 4, *supra*, Pet. 9-10). Not only was

[7] It may be noted that as drafted and enacted, Section 319(a) did not benefit a child whose parent was denaturalized under the prior law for presumptive or actual fraud, for such denaturalizations were expressly excepted in the section. However, this part of Section 319(a) is no longer operative, for children whose parents were denaturalized under the prior law had only two years from the date of denaturalization or two years from the effective date of the 1940 act to invoke its special provisions for naturalization.

there no issue in the district court as to the validity of the cancellation of his father's certificate (see R. 16), but petitioner expressly disclaimed any intention to attack that judgment when the case was before the Court of Appeals (R. 49).[8] Moreover, the resolution of any such issue would depend upon the facts as to the father's residence and they were not developed in the district court. This Court has repeatedly said that questions not raised below will not be considered here. *Luria* v. *United States,* 231 U. S. 9, 17; *Duignan* v. *United States,* 274 U. S. 195, 200; *Husty* v. *United States,* 282 U. S. 694, 701-702; *Becker Co.* v. *Cummings,* 296 U. S. 74, 80; *Sonzinsky* v. *United States,* 300 U. S. 506, 514.

Petitioner also contends that the effect of the decision below is to revoke his citizenship on a condition subsequent (Pet. 15) and that the construction of the 1906 act adopted by the court below makes the act "*ex post facto* in nature and spirit" (Pet. 17). There is no warrant for these contentions. Admittedly, the initial validity of his father's certificate was a condition precedent to the validity of petitioner's claim of citizenship. Petitioner's father was required to have had an intention of remaining a resident of this country when he obtained his certificate of citizenship. *Luria* v. *United States,* 231 U. S. 9, 22-24. The denaturalization judgment shows that the father had no such

[8] Consequently, as the Court of Appeals also noted (R. 49), "There is here no issue like that decided in *Klapprott* v. *United States,*" 335 U. S. 601, 336 U. S. 942, 949.

intention. Section 15 of the 1906 act was not ex post facto legislation; it merely deprived petitioner's father of a right to which he was not lawfully entitled. *Luria* v. *United States,* 231 U. S. 9, 26; *Johannessen* v. *United States,* 225 U. S. 227; *United States* v. *Dietz,* 52 F. Supp. 201, 202 (N. D. Calif.); *United States* v. *Holtz,* 54 F. Supp. 63, 66 (N. D. Calif.), affirmed *sub nom. Kuehn* v. *United States,* 162 F. 2d 716 (C. A. 9), certiorari denied, 332 U. S. 837.

Finally, petitioner contends there was a patent ambiguity in the 1906 act, because it made no provision in respect of the effect of the cancellation of a naturalization certificate on derivate rights (Pet. 17). This argument, which is based on *Perkins* v. *Elg,* 307 U. S. 325, 337, lacks merit. In that case, this Court held that an American born child did not lose her citizenship as the result of the *expatriation* of her naturalized parent. There, the child was a citizen at birth, regardless of the nationality of her parents. Here, petitioner has no rights of citizenship other than under the naturalization certificate of his father, and as we have shown, there was no necessity for providing for the revocation of derivate rights of citizenship which were entirely dependent on the initial validity of a basic naturalization certificate.[9]

---

[9] Such cases as *United States* v. *Eliasen,* 11 F. 2d 785 (W. D. Wash.), and *Haaland* v. *Attorney General of the United States,*

The only decisions in conflict with the decision below, and indeed the only other reported decisions dealing with the precise issue presented here, are district court decisions in *In re Findan,* 4 F. Supp. 189 (D. R. I.), and *In re Bolter,* 66 F. Supp. 566 (S. D. Calif.). In neither of these cases, however, was there any reference to the legislative history of either the 1906 or the 1940 act or to the *Luria* decision of this Court. And in the *Bolter* case, the court relied largely upon the *Elg* decision. As we have pointed out above, and as the court below observed (R. 50), such reasoning is erroneous, for it fails to take account of "the required distinction * * * between the effect of a cancellation of a certificate of citizenship based on its invalidity *ab initio* and a cancellation based on the loss of citizenship by expatriation of the kind which leaves the certificate of citizenship valid at the time issued and up to the date when citizenship is lost."

As we have indicated, the question presented by this case affects only the derivative rights of those who claim through one who was denaturalized under the 1906 act. Section 338(d) of the 1940 act, as we have pointed out, preserves the derivative rights of the wife or minor children of a person who is denaturalized under the provisions of that act,

---

42 F. Supp. 13 (D. Md.), also cited by petitioner as being in conflict with the decision below, involved expatriation and are similarly inapposite.

except where the denaturalization is "the result of actual fraud."

Finally, it should be noted that petitioner is a lawful resident of the United States and that, if he is qualified as "a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States" (Sec. 307, Nationality Act of 1940, 8 U. S. C. 707), he may now be naturalized as the surviving husband of a deceased citizen-wife without first filing a declaration of intention, pursuant to the provisions of Section 310 of the Nationality Act of 1940, 8 U. S. C. 710.[10]

---

[10] *United States ex rel. Willumeit* v. *Watkins*, 171 F. 2d 773 (C. A. 2), certiorari granted June 27, 1949, No. 82, and *United States ex rel. Eichenlaub* v. *Watkins*, 167 F. 2d 659 (C. A. 2), certiorari denied, 335 U. S. 867, order denying certiorari vacated and certiorari granted June 27, 1949, No. 3, involve the question whether cancellation of a certificate of citizenship for actual fraud pursuant to the provisions of the Nationality Act of 1940 renders the person so denaturalized subject to deportation on account of his conviction, prior to the cancellation, of a crime for which an alien may be deported.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

ALEXANDER M. CAMPBELL,
Assistant Attorney General.

ROBERT S. ERDAHL,
KENNETH C. SHELVER,
Attorneys.

JULY 1949.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1949 945341 22